FILED
JUL 29 1999
OFFICE OF THE CLERK

No . 99-25

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

VINCENT GENCARELLI,
Petitioner,

vs.

MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION, and
CITY OF WORCESTER, MASSACHUSETTS,
Respondents.

On Petition For Writ Of Certiorari
To The Supreme Judicial Court For
The Commonwealth Of Massachusetts

CITY OF WORCESTER' S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

David M. Moore, City Solicitor
Counsel of Record
Elizabeth M. Sanning, Assistant City Solicitor
Counsel of Record
Room 301, City Hall
455 Main Street
Worcester, MA 01608
(508) 799-1161

13??

QUESTION PRESENTED FOR REVIEW

Whether the petitioner was unconstitutionally deprived of the opportunity to raise the claim that a regulatory taking occurs when environmental regulations do not substantially promote a legitimate state interest, when the lower court ruled that the doctrine of collateral estoppel required him to raise the taking issue in an earlier case which had resulted in the order to begin the administrative process rather than allowing him to raise the taking issue at the conclusion of that administrative process?

TABLE OF CONTENTS

Page

Question Presented for Review.....i

Table of Contents ii

Table of Authorities.....iii

Statement of the Case 1

Reasons for Denying the Writ.....5

A. The Supreme Court Lacks Jurisdiction to Grant Gencarelli's Petition Because It Involves Only Questions Of State Law.....5

B. Gencarelli's Petition Should Be Denied Because It Fails To Raise An Important Federal Question.....8

Conclusion 9

TABLE OF AUTHORITIES

Page

Cases Cited:

Coleman v. Thompson, 501 U.S. 722 (1991).....7

Intern. Longshoreman's Ass'n, AFL-CIO v. Davis, 476 U.S. 380 (1986).....7

Kyles v. Whitley, 514 U.S. 419 (1995).....9

Lambrix v. Singletary, 520 U.S. 518 (1997).....7

Ridgway v. Ridgway, 454 U.S. 46 (1981).....6

Statutes Cited:

28 U.S.C. § 1257.....6,7

Rules Cited:

Supreme Court Rule 10.....8

STATEMENT OF THE CASE

Although nominally a lawsuit between the petitioner, Vincent Gencarelli ("Gencarelli") and the Department of Environmental Protection ("DEP"), the current action is grounded in a dispute between Gencarelli and the City of Worcester ("Worcester") that has been ongoing since the mid-1980's when Worcester first noticed that Gencarelli was doing work on his land in violation of the Wetlands Protection Act and in violation of Worcester's Conservation Commission regulations.

Gencarelli has admitted that he filled in certain wetlands on his property during the mid-1980's but he argues that he subsequently recreated those wetlands elsewhere on his property. Worcester and Gencarelli have been arguing about the validity of Gencarelli's position on the recreation of the wetlands since Worcester first initiated an enforcement action against Gencarelli in 1989. The matter between

Worcester and Gencarelli has been litigated in the Massachusetts Superior Court (Worcester County) and the Massachusetts Appeals Court. The instant case involving the same parties has been litigated in the Department of Environmental Protection, the Massachusetts Superior Court (Suffolk County), and the Massachusetts Appeals Court. The Massachusetts Supreme Judicial Court declined to grant further appellate review of the Appeals Court's decision. Petitioner now seeks relief from the Supreme Court.

In January 1991, the Worcester Superior Court determined that Gencarelli acted in violation of the Wetlands Protection Act by altering wetlands on his property and that those wetlands must be restored. At the time it made its determination, the Court knew that Gencarelli had filed a Notice of Intent restating his belief that he had adequately "recreated" the wetlands and that "no further work [was] proposed for his property". This Notice of Intent was denied by Worcester's Conservation Commission and appealed to

DEP in 1990.[1] Despite the existence of the DEP appeal, the Worcester Superior Court issued its order requiring Gencarelli to "file with the Worcester Conservation Commission a Notice of Intent containing a specific plan for the removal of fill from the [ ] wetland and the restoration of the wetland as nearly as possible to its condition prior to his filling of the wetland." (emphasis added). No notice of intent containing a restoration plan was ever filed pursuant to the Court's order.

Gencarelli appealed the Worcester Superior Court's judgment and this Court upheld the decision. Gencarelli filed no further appeal. By June 1993, the Worcester Superior Court's decision was final and the Court again ordered Mr. Gencarelli to provide the Worcester Conservation Commission with a "restoration plan for the site". That

---

[1] It is the Worcester Conservation Commission's determination of the inadequacy of this notice of intent that forms the basis for the instant lawsuit.

judgment has never been modified and is still in force and effect.[2]

Gencarelli first raised the issue of a regulatory taking in the Suffolk Superior Court lawsuit he filed in 1996. He never raised it in his Worcester Superior Court case or in the appeal of the trial court's decision. He never raised it at the administrative or trial level at DEP.

---

[2] Between June 1993 and the present time, Gencarelli has repeatedly ignored Worcester's efforts to force him to comply with the Worcester Superior Court's judgment. Worcester has filed motions for sanctions, sought determinations that Mr. Gencarelli is in contempt of court, has had Mr. Gencarelli imprisoned, and has returned to court numerous times to enforce the judgment. To date, Gencarelli has refused to comply with the Court's judgment/order.

REASONS PETITION SHOULD BE DENIED

A. The Supreme Court Lacks Jurisdiction To Grant Gencarelli's Petition Because It Involves Only Questions Of State Law.

This case does not involve a question of whether petitioner's property was improperly taken by DEP but rather one of whether Gencarelli should have first raised any issue of a regulatory taking in the Worcester Superior Court action when he was ordered to "file with the Worcester Conservation Commission a Notice of Intent containing a specific plan for the removal of fill from the [ ] wetland and the restoration of the wetland as nearly as possible to its condition prior to his filling of the wetland."

The Massachusetts Appeals Court determined that Gencarelli's current claim of a regulatory taking is a collateral attack on the Worcester Superior Court's 1991

judgment and, therefore, he is precluded from raising that issue now.[3]

The Supreme Court has no jurisdiction to review cases that involve only questions of state law. *See* Ridgway v. Ridgway, 454 U.S. 46, 54, 102 S. Ct. 49, 54 (1981) (Supreme Court's only power over state court judgment is to extent it incorrectly adjudges federal rights). Gencarelli claims jurisdiction under 28 U.S.C. § 1257(a) which states:

> final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution ....

---

[3] Despite the phrasing of petitioner's "question presented", the Massachusetts Appeals Court did not determine that the doctrine of collateral estoppel barred his claim.

28 U.S.C. § 1257. It is unclear from Gencarelli's petition which state or federal statute is being called into question. However, assuming that Gencarelli is arguing that a right claimed under the Constitution is at issue, this Court should not review that question if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural. In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Lambrix v. Singletary, 520 U.S. 518, 522-523, 117 S. Ct. 1517, 1522 (1997); Coleman v. Thompson, 501 U.S. 722, 729-780, 111 S. Ct. 2546, 2553-2554 (1991); Intern. Longshoreman's Ass'n, AFL-CIO v. Davis, 476 U.S. 380, 386-389, 106 S. Ct. 1904, 1911 (1986).

The issue of whether Gencarelli should be allowed to collaterally attack the Worcester Superior Court's 1991 judgment through his 1996 DEP action is independent of any

federal question. The Massachusetts Appeals Court's decision refusing to allow the collateral attack is adequately supported by the record. Therefore, this Court has no jurisdiction over the issue raised in Gencarelli's petition.

B. Gencarelli's Petition Should Be Denied Because It Fails To Raise An Important Federal Question.

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.... This Court may choose to grant certiorari if:
>
> (a) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; or
>
> (b) a state court ... has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Supreme Court Rule 10. In his petition, Gencarelli does not present any compelling reason why he should be granted certiorari nor does he state an important federal question that

should be heard by this Court. Instead he creates a fact specific dispute, which raises no important issue of federal law, and details no situation in which the Massachusetts courts applied an incorrect standard of law. *See* Kyles v. Whitley, 514 U.S. 419, 456-457, 115 S. Ct. 1555, 1576-1577 (1995) (dissent). Therefore, even if this Court were to determine it had jurisdiction over Gencarelli's claim, his petition should be denied because it fails to raise a significant issue of federal law.

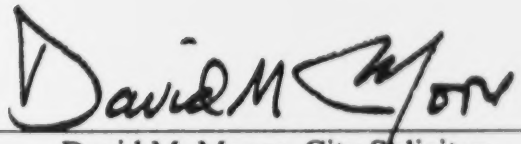
CONCLUSION

For the reasons detailed above, both because this Court lacks jurisdiction over the claim detailed in Gencarelli's

petition and because Gencarelli fails to raise any important issue of federal law, the city of Worcester asks this Court to decline to grant petitioner's writ.

The Respondent,
CITY OF WORCESTER,

By its Attorneys,



David M. Moore, City Solicitor
Counsel of Record
Elizabeth M. Sanning, Ass't City Solicitor
Room 301 - City Hall
455 Main Street - Worcester, MA 01608
(508) 799-1161